CHE WAN DEVELOPMENT SDN. BHD.

v.

CO-OPERATIVE CENTRAL BANK BHD.

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[ORIGINATING SUMMONS NO. S5-31-3640-88]
5 MAY 1989

CIVIL PROCEDURE: *Stay of Execution - Application for stay of execution pending appeal to Supreme Court - Order of the High Court - Charge on plaintiffs lands in favour of defendant as chargee was void and unenforceable - Section 133 Companies Act 1965 - Registration of chargee was ordered to be cancelled and all documents of title be returned to plaintiff - Inherent Jurisdiction to stay execution - Whether Court has inherent jurisdiction over all judgments or order which it has made to stay execution in all cases.*

LAND LAW: *Judgment or order for possession of land - Whether Court has inherent jurisdiction (because no power has been conferred under rules of Court or by statute) to stay or suspend the execution of judgment or order for possession of land against trespasser - Order 47 r. 1(1) Rules of the High Court 1980 - Section 73 of the Courts of Judicature Act 1964.*

CIVIL PROCEDURE: *Whether appeal operates as stay of execution - There must be special circumstances deposed in the affidavit supporting application for stay in relevance to enforcement of judgment - Whether Court to have regard to matters which may operate as a defence in law or relief in equity - General rule for stay - Special circumstances - Evidence must be deposed to on affidavit showing that if the defendant succeeded in its appeal the plaintiff will be unable to pay back the money levied by execution against the defendant.*

This was an application by the defendant, Co-operative Central Bank for a stay of execution pending an appeal to the Supreme Court.

On 30 March 1989 the High Court Kuala Lumpur, Dato N.H. Chan J declared that a charge on the plaintiff's lands in favour of the defendant as chargees was void and unenforceable as it contravenes the prohibitions in s. 133 of the Companies Act 1965.

On 24 April 1989, the learned Judge of the High Court also ordered that the registration of the charge be cancelled and that all documents of title be returned to the plaintiff. Hence this application for stay of execution by the defendant pending his appeal to the Supreme Court for which he has lodged notice of appeal.

Held:

[1] In the instant case apart from merely contending that the plaintiff is an insolvent company and would not be able to pay damages in the event of the defendant's appeal succeeding, there has been no evidence adduced in its supporting affidavit to show that the plaintiff is an insolvent company.

[2] In any case, the orders which the Court has made in the present case are not for the payment of money to the plaintiff, it is therefore hypothetical to consider whether there were any circumstances in evidence to show that the plaintiff, if it is defeated in the Supreme Court, will be unable to pay back the money levied by execution against the defendant.

[3] It is impossible to suggest that on the basis of the orders which the Court has made the plaintiff ought to be deprived of its rights on the judgment the fruits of which it would have been fully entitled.

[4] As there is nothing in the law and the facts which would make it just or proper for the Court to grant a stay of execution, the application for a stay of execution was therefore dismissed with costs.

[Application for stay of execution dismissed with costs.]

Cases referred to:
London Permanent Benefit Building Society v. de Baer [1969] 1 Ch 321
Polini v. Gray [1879] 12 Ch D 438
Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board [1945] KB 394
TC Trustees Ltd. v. JS Darwen (Successors) Ltd. [1969] 2 QB 295
Brook v. Emerson [1906] 95 LT 821
McPhail v. Persons, names unknown [1973] 1 Ch 447
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406
Monk v. Bartram [1891] 1 QB 346
A-G v. Emerson [1889] 24 QBD 56
Atkins v. GW Ry [1886] 2 TLR 400
TC Trustees Ltd. v. JS Darwen (Successors) Ltd. [1969] 2 QB 295
Barker v. Lavery [1885] 14 QBD 769
The Annot Lyle [1886] 11 PD 114
Wilson v. Church (No. 2) [1879] 12 Ch D 454

Legislation referred to:
Companies Act 1965, s. 133
Courts of Judicature Act 1964, s. 73
Administration of Justice Act 1970 [UK], s. 36(2)
Rules of the Supreme Court [UK], O. 59, r. 13(1)
Rules of the High Court 1980, O. 42 r. 17, O. 47 r. 1

Other sources referred to:
Halsbury's Laws of England, 4th Edn. Vol. 17

For the defendant/applicant - Cecil Abraham & S. Sunendran; M/s Saheran & Woon
For the plaintiff/respondent - Hira Singh & Asbir Kaur Sangha; M/s Asbir, Hira Singh & Co.

JUDGMENT

NH Chan J:

This is an application by the defendant, Co-operative Central Bank Bhd. for a stay of execution pending an appeal to the Supreme Court. I have on 30 March 1989 declared that a charge on the plaintiff's lands in favour of the defendant as chargee was void and unenforceable as it contravenes the prohibitions in s. 133 of the Companies Act 1965 on this type of transactions.

On 24 April 1989, I have also ordered, after hearing lengthy argument from Counsel on both sides, that the registration of the charge be cancelled and that all documents of title be returned to the plaintiff. The defendant has lodged notice of appeal to the Supreme Court.

"The Court does not ... have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases.": *Halsbury's Laws of England*, 4th Edn., Vol. 17 [1976], p. 270, para. 451. The case which is cited in the footnotes in support of this statement is *London Permanent Benefit Building Society v. de Baer* [1969] 1 Ch 321. There, Plowman J (at 332, 333) held that the statement in the 3rd Edn. of *Halsbury's Laws of England* (Vol. 16 [1956], p. 34, para. 49) that the Court "has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases either for a definite or unlimited period", is wrong. The Judge said that it is too widely stated and is not supported by the two cases (*Polini v. Gray* [1879] 12 Ch D 438 and *Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board* [1945] KB 394) which are cited in the footnotes in support of it. The Judge also referred to O. 42, r. 17 and said (at 333) that "the rule is therefore one which applied only to money judgments and does not, in my judgment, support the much wider statement in *Halsbury's Laws of England*" 3rd Edn.

This view has the support of the Court of Appeal in *TC Trustees Ltd. v. JS Darwen (Successors) Ltd.* [1969] 2 QB 295 by Lord Denning MR at 302:

> We were referred to a statement in *Halsbury*, 3rd Edn. Vol. 16 [1956], 'Execution' p. 34. But I think it is too widely stated. The authorities cited did not support it.

The old O. 42, r. 17 was in the following terms, so far as material:

> Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of eligit to enforce payment thereof, subject nevertheless as follows: ... (b) The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

Nowadays, it is O. 47 r. 1.

Our O. 47 r. 1(1) is in the following terms:

> 1.(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution:
>
> (a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or
>
> (b) that the applicant is unable from any cause to pay the money; or
>
> that, notwithstanding anything in r. 2 or 3, the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the Court thinks fit.

Brook v. Emerson [1906] 95 LT 821 is clear authority for the proposition that unless a party came within the rules under which a stay could be granted, the Court would not grant a stay, and that the rules applied only to a stay of execution by a writ of *fieri facias* or elegit, or, pending appeal. As there was no appeal in that case, the only jurisdiction which the Judge could have would be under O. 42, r. 17. Thus the rules could not be applied to restrain bankruptcy proceedings as these were not provided for by the rules.

Farwell LJ said (at 823):

> I think that the order of Sutton J was intended to restrain proceedings in bankruptcy by the creditor, and that for that purpose he ordered that 'all proceedings on the judgment be stayed'. In my opinion the learned Judge has no jurisdiction at all to restrain proceedings in bankruptcy. The only jurisdiction which he could have would be under O. 42, r. 17, which provides that "The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit' ... O. 42, r. 17, applies simply to judgments for a sum of money ... Under O. 42, r. 17, the Judge has no jurisdiction to do more than to stay execution by *fieri facias* or elagit. I am of the opinion that the learned Judge had no jurisdiction at all to make this order.

In *McPhail v. Persons*, names unknown [1973] 1 Ch 447, at 460, Lord Denning MR said that in the case of a mortgagee who seeks possession of a dwelling house, that

> The Court has power by statute (Administration of Justice Act 1970, s. 36(2)) to suspend the order. This goes to show that, apart from statute, the Court would have no such power.

It seems to me to be plain that the Court has no general inherent jurisdiction to grant a stay of execution beyond the jurisdiction given by certain statutes (such as s. 36(2) of the English Administration of Justice Act 1970 and, in this country, such as s. 73 of the Courts of Judicature Act 1964) or by the Rules of the High Court (such as O. 47, r. 1). No authority can be produced showing that such a jurisdiction exists outside the power conferred by rules of Court or by statute. The Court, therefore, has no inherent jurisdiction (because no power has been conferred under rules of Court or by statute) to stay or suspend the execution of the judgment or order for possession of land against a trespasser; see *McPhail v. Persons*, names unknown, *supra*.

In the present case which is an application for a stay of execution by the defendant, O. 47, r. 1(1) does not apply as that rule only applies to money judgments. The only thing that is applicable here is s. 73 of the Courts of Judicature Act 1964.

Stay of Execution Pending Appeal

An appeal does not operate as a stay of execution. See s. 73 of the Court of Judicature Act 1964 (revised 1972) which reads:

> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so for as the Supreme Court may direct.

This is similar to the provisions of the English RSC, O. 59, r. 13(1). See also *Halsbury's Laws of England*, 4th Edn., Vol. 17 [1976], p. 272, para. 454 which reads:

> Except so far as the Court below or the Court of appeal may otherwise direct, an appeal does not operate as a stay of execution or of proceedings under the decision of the Court below, and no intermediate act or proceeding is invalidated by an appeal.

This is what *Halsbury's Laws of England* says on the effect of the English O. 59, r. 13(1); 4th Edn., Vol. 17 [1976], at p. 272, para. 455:

> The Court has an absolute and unfettered discretion as to the granting of refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing.

And the position is this country is as stated by Hashim Yeop Sani J (as he then was) in *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, at 407:

The law on the granting of an order for stay of execution has been examined a number of times in the Courts of this country. It is trite law that the Court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule the Court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application. The governing principle in all cases where the Court is asked to exercise its discretion is clearly expressed by Brown J in *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116 and the principle is this: the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. The principle enunciated here goes back to many years ago as can be seen in *Monk v. Bartram* [1891] 1 QB 346. In that case stay had been refused by the trial Judge and in the Court of Appeal it was held that where a stay of execution has been refused by the trial Court an application made in a Court of Appeal for a stay pending appeal must be supported by special circumstances and allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances. Lord Esher MR in the Court of Appeal when refusing the application for stay said:

> We have made inquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this Court in cases of trials before a Judge without a jury. It has never been the practice in either case to stay execution after the Judge at the trial has refused to grant it, unless special circumstances are shown to exist.

Put shortly, it is this: that the Court has a discretion as to the granting or refusing of a stay of execution pending appeal and that as a rule it will only grant a stay if there are special circumstances, which circumstances must be deposed to on the affidavit supporting the application.

Discretion

As for the discretion of the Court on the granting or refusing of a stay, see *A-G v. Emerson* [1889] 24 QBD 56. This is what Lord Esher MR said (at 58):

> The real question is, what is the construction of this rule? It says: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.' In all the rules the word 'may' has been held to mean 'may or may not'. It has been held to give a discretion, which is called a judicial discretion, but is still a discretion.

In this country, the words in s. 73 of the Courts of Judicature Act 1964 are, "unless the Court ... so orders". Plainly, this gives a discretion to the Court. A judicial discretion, no doubt, which must be guided by proper rules founded on principle.

Special Circumstances

It is plain that the validity or correctness of the decision appealed from are not special circumstances.

In *Monk v. Bartram* [1891] 1 QB 346, CA, the headnote reads:

> Where a stay of execution has been refused by the Judge at the trial, an application made to the Court of Appeal for a stay pending an appeal must be supported by special circumstances, and allegations that there has been misdirection, that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the Court will grant the application.

This is what Lord Esher MR said (at 346):

> It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution.

And Bowen and Fry LJJ agreed with the Master of the Rolls.

Merits or strong grounds for an appeal are also not special circumstances. In *Atkins v. GW Ry* [1886] 2 TLR 400, Lord Esher MR said:

> ... but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.

When the Court is exercising its inherent jurisdiction to stay the execution of a judgment or order (which, as earlier explained, is not a general power to order a stay but is only a limited power conferred by statute (such as, as here, s. 73 of the Courts of Judicature Act 1964) or under rules of Court (such as O. 47 r. 1)), the Court is not to have regard to matters which may operate as a defence in law or relief in equity, for such matters must be raised in the action itself, but it is to rely only on grounds which are relevant to a stay of the enforcement of the judgment or order itself: see *TC Trustees Ltd. v. JS Darwen (Successors) Ltd.* [1969] 2 QB 295, CA. This is what Lord Denning MR said, at 302:

> In this very case the defendants, in their affidavit under RSC, O. 14 did raise a plea for equitable relief. But it was overruled, and judgment given against the defendants. It is not permissible to renew it again on an application for a stay of execution.
>
> We were referred to a statement in *Halsbury*, 3rd Edn. Vol. 16 [1956], 'Execution', p. 34. But I think it is too widely stated. The authorities cited do not support it. It is true that the Courts have an inherent jurisdiction to stay (execution) proceedings, but only on grounds which are relevant to stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for those must be raised in the action itself.

See also *Halsbury's Laws of England*, 4th Edn., Vol. 17 [1976], p. 270, para. 451:

> ... the Court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.

Similarly, in the case of a money judgment, where O. 47, r. 1(1) applies, the Court is not to have regard to the validity or correctness of the judgment but only to concern itself with the special circumstances which are relevant to the enforcement of the judgment; see per Lord Denning MR in *Trustees Ltd. v. Darwen (Successors) Ltd*., at 302:

> Mr. Lipfriend raised a further point. He said that under RSC O. 47, r. 1, there is power, in the case of a writ of fi. fa., or elegit, to stay (execution) proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. ... The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness.

See also *Halsbury's Laws of England*, 4th Edn., Vol. 17 [1976] p. 270, para. 451, which reads:

> The special circumstances which entitle the Court to stay execution of a money judgment are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness.

And the case which is cited in the footnotes in support of this rule is *TC Trustees Ltd. v. JS Darwen Ltd.*

In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances. This is because, as was said by Lord Esher MR (at 400) in *Atkins v. GW Ry, supra,* "strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so", or as was put by Lord Denning MR (at 302) in *Trustees Ltd. v. Darwen, supra,* those are matters which "must be sought in the action itself, before judgment is given. It is too late to come after judgment ... It is not permissible to renew it again on an application for a stay of execution."

In the defendant's affidavit in support of the application for a stay of execution, the defendant says that there are merits in its appeal. The defendant says that s. 133 of the Companies Act 1965 is capable of a construction that a breach merely attracts a criminal sanction or, alternatively, that the transaction is rendered voidable and that they have strong grounds for an appeal on the consequential orders which I made on 24 April 1989. For reasons which I have stated above, in my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the defendant to a stay of execution.

In fact, "as a general rule, the only ground for such a stay (of execution) is an affidavit showing that if the damages and costs were paid there was no reasonable probability of getting them back even if the appeal succeeded ... In *Barker v. Lavery* 14 QBD 769 the Court enunciated that rule when Lord Selborne, then Lord Chancellor, was present, and he was precisely of the same opinion.": *Atkins v. GW Ry* [1886] 2 TLR 400, per Lord Esher MR following *Barker v. Lavery* [1885] 14 QBD 769, CA.

I reproduce below the short report of *Barker v. Lavery* [1885] 14 QBD 769:

> Application of the defendant for stay of execution for costs pending an appeal to the House of Lords. The appeal was heard in this Court on 23 February. The application was made by way of original motion.
>
> Beddall, for the defendant: In order to obtain a stay of execution, the defendant is willing to pay the amount in dispute into Court.
>
> Brett MR: This Court has on previous occasions refused to stay execution pending an appeal without evidence of special circumstances.
>
> Earl of Selborne LC: Are there any circumstances in evidence to shew that the plaintiff, if he is defeated in the House of Lords, will be unable to pay back the money levied by execution against the defendant?
>
> The defendant is not now prepared with an affidavit to that effect; and it is submitted that *Merry v. Nickalls Law* Rep. 8 Ch 205, *Morgan v. Elford,* 4 Ch D 352, and *Wilson v. Church* 12 Ch D 454, all show that no evidence as to the means of the respondent to the appeal is necessary. But at all events time ought to be granted to the defendant to enable him to file an affidavit as to the plaintiff's means: the defendant believes that he can obtain evidence to show that the plaintiff is not in a position to repay any sum, which he may levy by execution.
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> (A.J. Ashton, was not called upon to argue for the plaintiff.)
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> Earl of Selborne LC: The defendant is not entitled to have the application granted as a matter of Courts. Evidence ought to have been adduced to shew, that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those, who apply for a stay of execution, must come before us prepared with all necessary materials.

Brett MR: I am glad to find that the practice prevailing in this Court now supported by the authority of the Lord Chancellor.

Lindley LJ, concurred.

And this rule applies equally to Admiralty cases; see *The Annot Lyle* [1886] 11 PD 114. Lord Esher Mr said, at 116:

To grant the present application would, in the absence of special circumstances, clearly be to act contrary to the provisions and intention of the Rules of Court.

And Brown LJ said (at 116):

I am of the same opinion. An unsuccessful litigant comes to ask us to deprive a successful one of the fruits of his success, until a further appeal is determined. No affidavit has been made on behalf of the applicants, and we must therefore assume that if the money is paid over to the respondents, and the appeal is successful, the appellants will be able to get it back. There is no reason, in my opinion, why in Admiralty cases we should make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds, to which *prima facie* he is entitled,for a long time because they are secured by the bail bond. We cannot assume that it is a matter of small importance to a successful party to go without his damages for a long time. The rule which this Court laid down in *Barker v. Lavery* 14 QBD 769 applies to Admiralty cases as much as to the others which come before the Court, for no special distinction between the different classes of cases has been drawn in the Rules of Court.

Fry LJ said (p. 116):

I am also of opinion that in the absence of special circumstances the application must be refused.

In the instant case, apart from merely contending that the plaintiff is an insolvent company and would not be able to pay damages in the event of the defendant's appeal succeeding, the defendant did not in its affidavit supporting the application for a stay of execution adduce any evidence to show that that is so. No evidence has been adduced in its affidavit to show that the plaintiff is an insolvent company and would therefore not be in a position to pay damages in the event of the defendant's appeal succeeding. At this point, if a stay is not granted, the plaintiff would have all documents of title returned to itself and therefore unless evidence is adduced to the contrary, this Court must assume that the plaintiff is not insolvent.

In any case, the orders which I have made in the present case are not for the payment of money to the plaintiff (whereas *Atkins v. GW Ry*, *Barker v. Lavery* and, *The Annot Lyle* were) and it is therefore hypothetical to consider whether there were any circumstances in evidence to show that the plaintiff, if it is defeated in the Supreme Court, will be unable to pay back the money levied by execution against the defendant. As for O. 47 r. 1(1), it only applies to a judgment or order "for the payment by any person of money".

As for the payment of damages, I have not made such an order. It is something which the Supreme Court could make in the event of the defendant succeeding in its appeal. Therefore, there is no question of this Court staying execution on the damages which it has not decreed. This only goes to show that the defendant's only complain is the fear that the plaintiff is an insolvent company, but, as to which, there is no evidence which has been deposed to an affidavit. Insolvency (even if it can be established, but it has not been established in the present case) or the poverty of the plaintiff by itself is not a special circumstance for staying execution of a judgment in favour of the plaintiff except in the case of a money judgment (which this case is not) and where it has been deposed to on affidavit that there was no

reasonable probability of getting the money back after it had been paid over if the appeal succeeded as shown in the three cases which I have referred to (*Atkins v. GW Ry, Barker v. Lavery and, the Annot Lyle*).

In fact, if it is not a money judgment or order, as a general rule, the only other ground for a stay of execution is to show that there are special circumstances in evidence (which evidence must be deposed to on affidavit at the application for a stay) showing that if the defendant succeeded in its appeal it would be rendered nugatory. The authority for this is *Wilson v. Church* (No. 2) [1879] 12 Ch D 454. Mr. Cecil Abraham relies on it. He says that if a stay of execution is not granted, then his appeal, if successful, would become nugatory. I refer to para. 4 of the defendant's affidavit which has been filed in support of the present application. It states as follows:

> 4. I am advised in law and verily believe that if the consequential orders contained in prayers 2, 3 and 4 are not stayed, the defendant would have to return all the documents of title to the plaintiff forthwith. These titles when delivered to the plaintiff, the plaintiff are then at liberty to deal with the titles in any manner they deem fit including returning the documents of title which are sub-divided to the sub-purchasers. I am advised in law by my solicitors and verily believe that if these titles are returned to the plaintiff, who in turn, return it to the sub-purchasers and if the Supreme Court were to rule in favour of the defendant, then the appeal may well be rendered nugatory in that the sub-purchasers would have by then been either in possession of the titles or alternatively become registered in respect of those titles. The defendant would then have to commence new proceedings in the appropriate Court to set aside all such transactions and that will cause damage, costs and inconvenience to the defendant.

Wilson v. Church (No. 2) was a representative action which was brought by a bondholder (WM Wilson) of a railway company on behalf of himself and other bondholders, against the company, claiming that the money advanced by bondholders should be returned to them, instead of its being applied in the undertaking of the railway company. Judgment was given for the plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders. The headnote reads that "the bonds were payable to bearer, and the bondholders were very numerous and many were residing abroad".

On a motion to stay execution proceedings pending appeal by the defendants, Cotton LJ said, at 457:

> This is an application to stay the execution of an order for payment of a very large sum of money to the bondholders who are interested in it, on the ground that there is an appeal presented by the defendants, the unsuccessful parties, to the House of Lords.

The Judge went on to say at 458:

> I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

Brett LJ, at 459, put it thus:

> This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of the judicial discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory. That being the general rule, the next question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. Now it seems to me that, looking at this matter in the view of men of business, one cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to persons many of whom will never be able to be found; it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in America; and the practical result of paying this money out to the different bondholders, or to the persons who would be holding the bonds at the time, would be that the fund never could be got back again if the appeal were successful. Therefore, if this case is to be dealt with according to the general rule, it seems to me that the Court ought to stay the payment out of this fund.

Wilson v. Church is a special case.

There the facts were different and Cotton LJ said: "I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund."

I must also repeat and emphasise the words of Brett LJ:

> the question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. ... One cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to persons many of whom will never be able to be found; it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in America; and the practical result of paying this money out to the different bondholders ... would be that the fund never could be got back again if the appeal were successful.

But in the present case, the position is very much different from the situation as occurred in *Wilson v. Church*. In the instant case, there were only eleven purchasers and they could be easily found as opposed to the many bondholders who would be quite untraceable after the money is paid out in *Wilson v. Church*.

In fact, the defendant's complaint is not that the purchasers would be difficult to trace or that they were untraceable if the titles were transferred to them but that the defendant would be faced with inconvenience by having to recover from the purchasers if the appeal went in the defendant's favour. I need only to repeat what the defendant has stated in para. 4 of its affidavit;

> if these titles are returned to the plaintiff, who in turn, return it to the sub-purchasers and if the Supreme Court were to rule in favour of the defendant, then the appeal may well be rendered nugatory in that the sub-purchasers would have by then been either in possession of the titles or alternatively become registered in respect of those titles. The defendant would then have to commence new proceedings in the appropriate Court to set aside all such transactions and that will cause damage, costs and inconvenience to the defendant.

Again there is no evidence which has been deposed to on affidavit which would enable this Court to find that if a stay is not granted the appeal if successful would become nugatory. All that has been shown, and this is stated in the defendant's para. 4 of its affidavit, is that if the defendant succeeded in its appeal, it would face inconvenience in having to bring proceedings against the eleven purchasers.

In other words, the appeal, if successful would not be nugatory. Inconvenience there is no doubt, but not nugatory.

A word on *Polini v. Gray* [1879] 12 Ch D 348. The authority for the nugatory ground in a stay of execution application is *Wilson v. Church (No. 2)* not *Polini v. Gray. Polini v. Gray* is one of the two cases cited in support of the wrong (because it is too widely stated) statement in *Halsbury*, 3rd Edn., Vol. 16 [1956] p. 34, para. 49. *Polini v. Gray* is not a stay of execution of a judgment or order case at all. In fact, it is the reverse of *Wilson v. Church (No. 2). Polini v. Gray* is a case where the plaintiffs, who, after obtaining an injunction for the preservation of property (that is to say, an injunction to preserve the *status quo*) pending the outcome of an action wanted the injunction to be continued pending an appeal to the House of Lords after they have failed in the Court at first instance and at the Court of Appeal. This is what Jessel MR said, at 443:

> The question before us is this: An action is brought to determine the rights of claimants to a fund. The plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, *bona fide*, to prosecute an appeal to the Court of ultimate resort. The plaintiffs allege that that appeal will be nugatory if the fund is paid out to the defendants, and that if the plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming that contention to be correct in fact, the question is, whether this Court has jurisdiction to prevent such a consequence.

The Master of the Rolls then went on to say that the Court has jurisdiction to grant an injunction. He said (at 443, 444):

> It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. ... The rule under the Judicature Act is r. 3 of O. LII., which is this: 'It shall be lawful for the Court or a Judge upon the application of any part to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action.'
>
> The terms in which the jurisdiction is conferred are general and unlimited. How that jurisdiction should be exercised is a question of judicial discretion which must be guided by proper rules founded on principle. It is not every case in which the Court or Judge should interfere.

For the Court to interfere, it has first to be satisfied that the appeal will be rendered nugatory in that there will be danger of the fund not being forthcoming if it is successful in the House of Lords. He put in this way (445):

> ... the Court (at first instance), I assume (for I do not know the facts), being satisfied that there would be danger, if it were not to interfere for the interim protection of the fund, of its not being forthcoming if she succeeded in the House of Lords, the question is, is it not the duty of this Court to say that the fund ought to be preserved for the successful party?

Here the Master of the Rolls has repeated what he had said earlier (at 443), that the allegation that the appeal will be nugatory if the fund is paid out is to be correct in fact. And he went on to conclude that where there are very special or peculiar circumstances, the jurisdiction to grant an injunction to preserve the property should be exercised. This is what he says (at 445):

> Looking at the facts of this case, not forgetting the amount in dispute, and remembering the peculiar circumstances under which the fund was obtained, I think it would be right so to mould the order of the Court of Appeal as to keep the fund safe until the decision of the House of Lords is obtained. It must not be supposed from what I have said that I consider such an order to be by any means of course, or one that ought to be made except under very special or peculiar circumstances; but I think that when those special and peculiar circumstances exist the jurisdiction ought to be exercised.

And the Court of Appeal in that case held that in order for such an injunction to continue pending the outcome of the appeal to the House of Lords, special circumstances will have to be shown. This is how it was put by James LJ (at 445, 446):

> I had when the case was before us on the former occasion some misgiving which has led to this further argument today, and I am not yet entirely free from misgiving, not so much as to whether it is right or wrong to make an order in the present case, but as to whether the making such an order may not be a dangerous precedent and likely to lead to great mischief. What I have been afraid of is that it may be said to be a precedent for holding that if any one applies for an injunction and obtain it the injunction ought to be kept up as long as he can keep the litigation alive. If, however, it is distinctly understood that, as stated by the Master of the Rolls, the granting such an injunction pending an appeal is a thing to be done only under very special and exceptional circumstances, then probably the danger that I have been afraid of will not exist.

The plaintiff has obtained judgment, and it seems to me impossible to suggest that on the basis of the orders which I have made, the plaintiff ought to be deprived of its rights on the judgment the fruits of which it would have been fully entitled. Therefore, whether the judgment and the orders which I have made are right or wrong - and that is a matter which may be tested in the Supreme Court - I reach the conclusion that there is nothing in the law and the facts which I have already mentioned which would make it just and proper for me to grant a stay of execution.

The application for a stay of execution was therefore dismissed with costs.

Also found at [1989] 2 CLJ 584